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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

GARY BOUTON et al.,

Plaintiffs, Cross-defendants and  
Appellants,

v.

WANDA WING et al.,

Defendants, Cross-complainants and  
Respondents;

Steven James,  
Cross-complainant and Respondent.

B164004

(Los Angeles County  
Super. Ct. No. BC226374)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Kenneth R. Freeman, Judge. Affirmed.

Gary Bouton and Rita Bouton, in pro. per., for Plaintiffs, Cross-defendants and  
Appellants.

Deborah Perlman; Wanda Wing and Henry Wing, in pro. per., for Defendants,  
Cross-complainants, and Respondents.

Steven James, in pro. per., for Cross-complainant and Respondent.

This appeal arises out of failed real property investments. The trial court awarded judgment in favor of Gary and Rita Bouton, (Appellants), on the complaint, but against them on the cross-complaint. On appeal, they argue that the trial court (1) should have continued the trial, (2) erred in its evidentiary rulings, and (3) made findings unsupported by substantial evidence. We find no error and shall affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The parties are all investors, who collectively purchased residences in Arizona as investments. The Boutons filed a complaint against Henry and Wanda Wing and Steven James (Respondents) based on the sale of one of the investments, a house located on Taylor street (Taylor property). In a cross-complaint respondents sued the Boutons with respect to several other properties, arguing that Gary Bouton improperly advanced money to himself and improperly took out a loan forging Wanda Wing's signature, failed to pay the mortgages, sold the same investments to other investors, and that the Boutons failed to repay a loan from the Wings.

In a court trial, Mr. Bouton testified that he was the managing partner on the Taylor property and took out \$16,273 as part of a management fee. Ms. Wing testified that she received delinquent notices on the Taylor property and when she was unable to contact Mr. Bouton, paid the amounts due on the mortgage. Ms. Wing testified that loan documents for the Taylor property had her name on them but her signature had been forged. Charles Gelhurt testified that he paid \$750 a month in rent on the Taylor property before he eventually purchased the home.

With respect to the other properties, Ms. Wing testified that she invested a total of \$63,120 and received no return on the investment. Henry Wing testified that he loaned \$7,000 to Mr. Bouton and the loan remains unpaid. He testified that the Boutons withdrew \$27,491 from a partnership account after depositing \$17,706. Mr. Wing calculated the damages to him and to James as totaling \$150,805 based on rent received by the Boutons, the promissory note and interest on the promissory note.

The court dismissed the complaint (but not the cross-complaint) with respect to James. The trial court made the following findings, some of which the Boutons dispute:

“a. A limited partnership agreement was formed on November 21, 1988. [¶] b. Pursuant to this agreement Wanda Wing was the general partner and Rita D. Bouton, Gary L. Bouton, and Steve James were limited partners. [¶] c. The partnership invested in a single-family residence located at 302 E. Taylor, Tempe, Arizona. [¶] d. The initial investment was as follows – James \$15,000.00; Boutons’ investment --\$7,000.00; Wing’s – 10,000.00. [¶] e. Income and appreciation to be distributed as follows: Wanda Wing 10%; Rita Bouton 30%; Gary Bouton 30%; James 30%; [¶] f. During the period between 11/23/88 to 6/30/90, the Wings contributed an additional \$10,706.00. The Boutons withdrew \$24,491.00. [¶] g. During the period of August, 1990, through August, 1996, the gross income after mortgage payments was \$36,548.40. [¶] h. Gary Bouton received this gross amount, but did not account for how it was expended. [¶] i. Proceeds of a loan not authorized by general partner Wing for \$10,000.00 against the property were not credited to the partnership. Said loan was arranged and negotiated by Gary Bouton. [¶] j. In 1996, the property went into default due to Boutons failure to make timely mortgage loan payments. [¶] k. The Wings cured the default. [¶] l. The property was sold in 2001, generating a net income to the partnership of \$70,000. [¶] m. Income for the period beginning August, 1990, and ending when the property was sold in 2001 was \$106,548.40.”

The court distributed the proceeds as follows: \$10,654.48 to the Wings, \$31,963.44 to James, and \$63,926.88 to the Boutons. The court then subtracted the \$24,491.00 from what the Boutons had already received.

The court found that Gary Bouton breached his fiduciary duties by borrowing money on partnership assets, and failing to make timely mortgage payments. The court calculated the damage as \$46,548.40. It awarded this amount to the Wings on their cause of action for concealment and breach of contract. It awarded \$36,548.40 to the Wings on their causes of action for conversion and conspiracy and it awarded Henry Wing \$7000 on his cause of action for breach of contract.

This appeal followed.

## DISCUSSION

The Boutons argue that (1) the trial court abused its discretion in denying them a continuance to postpone trial; (2) the trial court erred in excluding evidence; and (3) parts of the judgment are not supported by substantial evidence. We shall discuss each contention seriatim.

### *I. Continuance*

According to the Boutons, the trial court should have granted their request for a continuance made on January 22, 2002, ten months after trial was initially scheduled and the day before trial ultimately began. Additional factual background is necessary to analyze this claim. We first summarize the relevant background and then discuss the Boutons' legal contentions.

#### *a. Factual Background*

The parties appeared on September 26, 2000, and the court set a trial date of March 14, 2001. At that time, the Boutons were represented by Charles Lebeau. The court ordered the parties to mediation and set the next court date as October 25, 2000. Mr. Lebeau appeared on that date and, on December 11, 2000, December 20, 2000, and February 9, 2001. On February 9, 2001, both parties indicated that they would be ready for trial on March 14, 2001.

On March 9, 2001, at the final status conference hearing, Mr. LeBeau requested an extension because of his poor health. On March 14, 2001, the court agreed to continue trial until May 23, 2001.

On May 23, 2001, the court discharged Lebeau over the Boutons' objection and granted a 90 day continuance at the Boutons' request. The court stated, "No matter what, this trial date of September 12th is going to remain. [¶] The only way it would change would be if a new attorney comes in and shows good cause for an additional continuance. And good cause is going to have to be legal good cause. . . . And the minute order will reflect at this time no further continuances without good cause."

Sheryl Hammer agreed to represent the Boutons and appeared on their behalf on May 31, 2001. She indicated that at that time she was comfortable with a trial date of

September 12, 2001. On August 29, 2001, defense counsel requested a continuance and the court agreed to a two-week continuance until September 26, 2001.

On September 12, 2001, Ms. Hammer requested the court continue trial until mid-November because the Boutons were unable to pay her fees until mid-October. On November 2, 2001, Robert Belshaw appeared for the Boutons and indicated that substitutions of attorney had been filed and he was the attorney of record. He stated that he had just been in a car accident and was on his way to the hospital and requested a three week continuance. Defense counsel objected to the continuance. The court indicated that it would make some accommodation but wanted trial to proceed sometime in November.

On November 7, 2001 the court continued the case to November 9, 2001 after Mr. Belshaw represented that he still did not have the file. On November 27, 2001, Mr. Belshaw appeared and requested to withdraw from representing the Boutons. He indicated that he had expected the Boutons to appear “and they have not returned my calls since I got the bad check. They just literally disappeared.” On November 29, 2001, the Wings requested a continuance until January because Mr. Wing was ill. The court continued the case until January 23, 2002.

On December 3, 2001, Mr. Bouton indicated that he paid the Bel-well Corporation \$15,000. Mr. Belshaw stated that he was not affiliated with that corporation, though he shared space with it. The court granted Mr. Belshaw’s motion to be relieved. The court told the Boutons, “If you hire another attorney, have that attorney come here before the 23rd. I can’t have someone brand-new show up on the 23rd and ask for a continuance. So if there is another attorney make certain that they come here. Make an ex parte application before the court if they are going to ask for anymore time. . . .”

On January 22, 2002, Allen Felahy appeared on behalf of the Boutons and requested a continuance. Felahy indicated that “my agreement with the Boutons [is] that I cannot represent them unless this court grants the continuance.” Felahy provided no explanation for waiting until January 22nd to request a continuance. The court denied the request for a continuance.

On January 23, 2002, Mr. Bouton appeared and requested a continuance. The court reviewed its prior statement and concluded, “I did indicate in the transcript that a timely application by a new lawyer needed to be filed before the court would consider any continuance. Having someone appear the day before the trial is not a timely application.” The court denied the Boutons’ request for another continuance.

### *Analysis*

An appellant challenging the denial of a continuance has the burden to establish that the ruling exceeded the bounds of reason under all the circumstances. Unless the appellant shows a clear abuse of discretion and unless there has been a miscarriage of justice, an appellate court will not substitute its opinion for that of the trial court. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170-172; *County of San Bernardino v. Doria Mining & Engineering Corp.* (1977) 72 Cal.App.3d 776, 783-784; Cal. Rules of Court, rule 375(a).) Among other factors, in determining whether to grant a continuance, the court may consider the proximity of the trial date and whether previous continuances were given. (Cal. Rules of Court, rule 375(d).)

Here, the court’s finding that the request was not timely was not an abuse of discretion. The Boutons indicated that they would be ready for trial on March 14, 2001, then requested a continuance to May 23, 2001, which was granted. On May 23, 2001, the trial court granted a 90 day continuance. In September, the Boutons’ attorney requested another continuance because, according to her, the Boutons had not paid her fees. The Boutons’ new counsel requested another continuance, which the court granted. On December 3, 2001, when it became clear that the Boutons’ attorney would no longer represent them, the court clearly told the Boutons that if they hire another attorney that the attorney would have to make an ex parte application “before the 23rd [of January]” to request a continuance. The Boutons, however, waited until the 22nd, the day before trial to request a continuance. Under these circumstances – where the trial court had given numerous continuances and specifically told the Boutons to file a timely ex parte motion if they intended to request a continuance -- the trial court did not abuse its discretion in

denying the Boutons' request for a continuance made the day before trial was scheduled to begin.

At oral argument, Mr. Bouton represented that the reporter's transcript does not accurately reflect all of the proceedings. According to Mr. Bouton, he has filed a complaint against the court reporter because the record is incomplete. He indicated that the trial court expressly stated that it would grant a continuance made the day before trial. These statements are not reflected in the record and therefore cannot be considered by this court. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29 ["It is axiomatic that an appellant must support all statements of fact in his briefs with citations to the record [citation] and must confine his statement 'to matters in the record on appeal.' [Citation.]"].)

The Boutons also argue that the failure to grant them a continuance deprived them of their due process rights and equal protection rights under the state and federal constitutions. According to them, "[c]learly, the Appellants' were deprived of the right to have counsel represent them in the trial and was constructively denied the right to be heard effectively at the trial." They argue that "they did not know how to present evidence" and could not adequately represent themselves in pro per.

Appellants have not shown that the constitutional provisions upon which they rely are applicable to a civil case. But, even if we assume that the provisions are applicable, the Boutons have not shown that they were denied due process or equal protection. The record indicates that, although it was not required to do so, the trial court explained procedures to the Boutons. The record discloses no unfairness as alleged by the Boutons. Nor have they shown that their rights to equal protection have been violated.

## *II. Evidentiary Rulings*

The Boutons argue that they "were not able to introduce in evidence partnership contracts, and business records because they did not know how to introduce evidence and they did not know how to object to any evidence presented by opposing counsel." A pro per litigant is not given preferential treatment. (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1210.) Thus, the fact that the Boutons

claim their evidence was not admitted because they were not familiar with the rules is not a cognizable claim of error.

The Boutons also appear to be arguing that the trial court erred in excluding Exhibit 12 because, according to them, it is a business record as defined in Evidence Code section 1271. What the Boutons identify as Exhibit 12 is comprised of hundreds of individual documents spanning eight years including agreements, correspondence, documents related to title, escrow, insurance, and limited partnerships. The Boutons do not establish the foundational requirements to admit these documents as a business record and the trial court did not err in excluding the evidence.

To admit a business record, the proponent of the evidence must show all of the following: “(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.” (Evid. Code § 1271.) The Boutons fail to demonstrate any one of these foundational requirements with respect to all of the documents contained in Exhibit 12.

The trial court informed the Boutons: “[Y]ou need to establish a foundation for exhibits.” “Whatever they are, there has to be a foundation established. Just because they are records without an indication of what they are records of, how the records were generated, who generated the records, what they used as the basis for the records.” The Boutons fail to show that any of the exhibits in Exhibit 12 satisfy the foundational requirements. The trial court did not err in excluding Exhibit 12.

### *III. Sufficiency of the Evidence*

The Boutons argue that there is insufficient evidence to support the verdict. We review a challenge to the sufficiency of the evidence to determine whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court’s findings. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754.) We do not reweigh the evidence

and are bound by the trial court's credibility determinations. (See *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1384.)

The Boutons' primary claim is that several of the trial court's findings are not supported by evidence because "Plaintiff Bouton was not allowed to submit . . . evidence" that would have shown the facts as found by the trial court to be untrue. The Boutons also state the evidence they sought to admit "refute[s] all the allegations made by the respondent." Because the Boutons have not demonstrated that the trial court erred in its evidentiary rulings, the purported failure to admit this evidence does not show that the judgment is unsupported. Stated otherwise, the Boutons are required to show that the record lacks evidence to support the judgment, not that there is additional evidence not presented during trial.

With respect to certain specific findings, the Boutons argue there is no evidence to support the trial court's finding that the Wings contributed \$10,706 between November 23, 1998 and June 30, 1990 and that the Wings contributed money to cure a default. The Boutons also state that there is no evidence to support the trial court's finding that the income for the property from 1990 to 2001 was \$106,548. The Boutons' argue that there was no evidence to support the trial court's finding that the damage to the partnership was \$46,548 or for the \$36,548 award against the Boutons in the third and fourth causes of action (conversion and conspiracy). They argue there was no evidence that Bouton did not complete his managerial duties.

Contrary to the Boutons' argument, the trial court's findings were supported by the testimony in the record. Wanda Wing testified that she wrote checks in the amount of \$4240, \$4000, and \$3000, and \$1000 on November 23, 1988, \$1000 on August 30, 1989, \$45 on October 17, 1989, \$2706 on November 11, 1989, and \$7000 on June 30, 1990. Wanda Wing testified that she contributed to cure the default and that testimony provides substantial evidence. She stated, "I paid the delinquent mortgage . . . ." Gelhert testified that beginning in August 1990, he paid \$750 a month until 2001, though at some point the payments became a lease with an option to purchase. Gehlert also testified that he received foreclosure notices on the property. There was evidence that the Boutons

appropriated the profits for their own benefit in support of the trial court's finding on the conversion and conspiracy causes of action. There was also testimony that Bouton did not complete his managerial duties even though he testified that he did.

That the Boutons disagree with the contents of the testimony does not show that the record lacks substantial evidence. The parties in this case had vastly different views of who was at fault. The trial court was required to make credibility determinations. In evaluating the record for substantial evidence, this court will not reweigh the trial court's credibility determinations.<sup>1</sup> (*Wurzl v. Holloway, supra*, 46 Cal.App.4th at p. 1754.)

### **DISPOSITION**

The judgment is affirmed. Respondents are entitled to costs.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J

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<sup>1</sup> While we have reviewed the entire record on appeal, it should be noted that the Boutons' substantial evidence argument fails to comply with any of the requirements for proving that claim. They did not provide copies of the evidence presented to the trier of fact which support the ruling of the trier of fact. The Boutons summarize the evidence in the light most favorable to them ignoring the contrary evidence. The Boutons also incorrectly state that James was not a party. While the trial court dismissed James as a defendant with respect to the Boutons' complaint, the trial court did not dismiss James as a cross-complainant.